Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-636

BUCKLEY TOWERS CONDOMINIUM, INC., a non profit Florida Corporation, on behalf of itself and its stockholders and members,

Petitioner,

versus

HERBERT BUCHWALD, individually and as trustee, and BUCKLEY DEVELOPMENT COMPANY, LTD.,

Respondents

REPLY BRIEF OF PETITIONER

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INDEX

PAGE NO.

Table of Authorities ii

Statement 1

Responsive Argument 7

Conclusion 8

Certification 10

TABLE OF AUTHORITIES

PAGE NO.

Buckley Towers Condominium, Inc. vs. Buchwald, 533 F. 2d 934 (5th Cir. 1976) 9

Burleigh House of Condominium, Inc. vs. Burleigh House, Inc., et al., F. 2d (5th Cir. 1977) 2

Byram Concretanks, Inc. vs. Warren Concrete Products Co., 374 F. 2d 649 (3rd Cir. 1967) 5

Hospital Building Co. vs. Trustees of Rex Hospital, 96 S. Ct. 1848, 48 L.Ed. 2d 338 (1976) 7

Northern Pacific Ry. Co. vs. United States, 365 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958) 7

OTHER AUTHORITIES:

Fla. Stat. 711.121 3

Fla. Stat. 718 3

IN THE SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONER

STATEMENT

Petitioner must respectfully differ with the Statement of Respondent In Opposition as to the following:

A. The membership of the Buckley Towers Condominium Association consists of more than one thousand individuals, not 569 individual unit owners as set forth in the statement of Respondents.

B. Petitioners-Plaintiffs did not take the position that no individual unit owners should be added as parties if, in the view of the Trial Court, an action in the nature of a class action was required.[1] In fact, in the opinion of the United

1. Subsequent to the dismissal of this cause an individual class action was filed in the United States District Court, but it too was dismissed.

States Court of Appeals, Fifth Circuit, giving rise to this Petition, 533 F. 2d 934 (5th Cir. 1976), the Court stated:

> "Subsequent to the entry of the Order of Dismissal the Appellant on August 11, 1975, moved the District Court for clarification of the Order of Dismissal, and for leave to amend the Complaint and to add or join as parties plaintiff the residential condominium unit owners. . ."
>
> ". . .the District Court denied the Appellant's Motion for leave to amend the complaint. . ."

C. Respondents represent in their statement that "the Condominium property consists of two categories (a) the privately owned units, and (b) the remaining condominium property (excluding the units) constituting the common elements, as described in the Declaration of Condominium.

The statement is not precise. In fact, the "Condominium" consists of *three* categories (a) the privately owned units, and (b) the remaining condominium property which constitutes common elements and (c) the unwanted 99 year "recreation lease".

If the contractual matters involved in this cause involved only the individual dwelling units and the common elements, which are owned in common by all unit owners, there would have been no reason for the institution of any action below. However the third element, the unwanted "recreation lease", a useless and parasitic appendage to the condominium without any social, business or other justification, *is* involved in this case and other cases similar to this one. See: *Burleigh House Condominium, Inc. vs. Burleigh House, Inc., et al.,*

F. 2d (5th Cir. 1977). (App. 1).

D. Respondents statement alleges or concludes that the Condominium Association has *no property interest* in any of the condominium property. This is not so. In the "Settlement Agreement" referred to in the brief of Respondents (R. 242-270), the Association is clearly shown to have property rights to 20 individual dwelling units. Beyond that, the Condominium Association has vested property interests in the condominium by virtue of recorded documentation creating and continuing the Condominium in existence.

Additionally, only the Condominium Association can enter into agreements affecting the property which consists of common elements (Fla. Stat. 718). In the same vein, Respondent's flat statement that the sole responsibility and legal duty of the Association is the maintenance of the common elements owned in common by the unit owners is factually incorrect. Among the responsibilities and legal duties of the Association is the duty to keep the Association solvent, to raise revenue, pay the obligations of the Association, to enter into contracts for the condominium with suppliers, etc., and to act rationally in conducting the corporate affairs of the condominium.

Nothing prohibits a condominium corporation in the State of Florida, whether a corporation for profit or a non-profit corporation from purchasing real estate, leaseholds or other possessory or use interests and, in fact, such purchases are expressly authorized by *Fla. Stat.* 711.121 (Appendix 2, Petitioners Brief in Support of Writ of Certiorari, now *Fla. Stat.* 718).

E. Respondents take the position in their statement that

the Condominium Association is merely a "conduit" and has the ability to assess ever-increasing amounts of money against its membership in order to pay the continually increasing rentals and other expenses required by the terms and conditions of the unwanted "99 year recreation lease". The assertion is not tenable since, as is the case in any business or tax situation of this type, the well is not bottomless. Assessments, like taxes, must be rational and not confiscatory.

The Condominium Association in the instant case, like other Condominium Associations, has some income from sources other than unit owners and is charged with making expenditures of all income on a reasonable basis, it must live within its budget and within the confines of reason and economic reality. The directors have fiduciary responsibilities.

The position taken by Respondents in their statement leads to the inescapable conclusion that the Lessor of the 99 year lease contract must ultimately gain possession of all of the individual condominium units and all of the condominiums property through the enforcement of Respondent's liens on the property, since it is mathematically and economically impossible to sustain and keep current the 99 year lease.

The offensive contract has already forced this and other actions and no relief is in sight.

Also disputing the "conduit" theory is the fact that Respondent Buchwald has sued Petitioner for recovery of legal fees for the defense of *this* anti-trust action. The action was filed in the State Court, in the Eleventh Judicial Circuit in and for the Dade County, Florida. *Buchwald vs. Buckley Towers Condominium, Inc.*, 76-33461 (18).

Denying a Motion to Dismiss and disregarding established law as expressed in *Byram Concretanks, Inc. vs. Warren Concrete Products Co.*, 374 F. 2d 649 (3rd Cir. 1967), that no attorneys fees can be recovered for a successful defense of an anti-trust action in a United States District Court, the State Court has held that such an action may be maintained in a *State* Court, (App. 2) even though it could not be maintained in a Federal Court.

Thus, for practical purposes, Respondents assertion that Petitioner is a "mere conduit" is not tenable.

F. Respondents also represent in their statement that "the recreation facilities provided for the exclusive use and benefit of the unit owners constitute an inseparable part of the condominium property in the same manner as the common elements. . ."This is absolutely *not* the case. The recreational lease is not only unwanted, but is completely *unnecessary* to the operation or existence of the Condominium. Nor is the lease inseparable. In fact, the lease premises are separated by legal description and are physically separate from the units and common elements.

G. Respondents also state that "they (members of the Association) are free to utilize any recreational facility of their own individual choice". This is a half truth. The Association may be theoretically free to utilize any recreational facilities of their own individual choice, but practically, *economically* and contractually it is impossible to do so since the Association and its members are tied forever (99 years) to the economic bondage and harsh realities of the 99 year lease which financially precludes them from the purchase of necessities for the condominium, let alone the use of other recreational facilities.

H. Respondents state that "the Association was not the victim of the alleged antitrust violation" (P. 8 - *Brief of Respondents).* The Association disputes this position. The Association is a victim and directly affected since *it must pay* the monies under the disputed contract. The Court should note that the Condominium Association is named as the Lessee in the contract and is bound to pay all the obligations of the 99 year lease *en toto* whether an individual unit owner pays an assessment levied against it or not. The Association must draw on other sources of income to make the payment, foregoing necessary purchases and, in practice, this is what occurs.

Additionally, failure of Petitioner to make the required rental and other payments of the 99 year lease results in state litigation against respondent and appointment of a receiver, to sequestrate funds and assets of petitioner, Buckley Towers, Inc. vs. Buchwald, 321 So. 2d 628 (Fla. App. 1976), etc., all of which has happened to Petitioner in this cause and which caused Petitioner and other corporate Condominium Associations in the position of Petitioner to seek relief in the Federal Courts.

I. The "Settlement Agreement" repeatedly referred to in the brief of respondents is nothing more than an agreement *signed by the respondents or their designees* in this cause between interrelated and interlocking entities, *prior to the assumption of control of the Condominium Association by its present unit owners.* That is to say, designees of the Respondents (including undisclosed owners of the 99 year lease) in this cause controlled all entities that executed the Settlement Agreement at the time it was signed for both Petitioner and Respondent.

In effect, Respondents left hand and right hand signed the Agreement and, since the Agreement was incorporated in a "friendly lawsuit" between the designees, it has been continually imposed upon Petitioner by State Court action on the theory that the Agreement is part of a Final Judgment binding on State Courts.

Not having been given the opportunity to present evidence or testimony in the District Court on the issues of standing or jurisdiction, Petitioner was unable to present its case to that Court.

RESPONSIVE ARGUMENT

Respondents essentially claim in their brief that Petitioner has not used the proper "magic words" to show standing in the complaint filed by Petitioner. This is apposite to the record *and* established law relating to standing. All that need be alleged, to show *standing* to state a claim in a case of this nature is a per se violation of the Sherman Act which damages the Plaintiffs personally. *Northern Pacific Ry. Co. vs. United States,* 365 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). Proof in support of the allegations should be permitted. *Hospital Building Co. vs. Trustees of Rex Hospital,* 96 S. Ct. 1848, 48 L. Ed. 2d. 338 (1976).

Since the complaint was dismissed prior to any evidentiary hearings (in fact, Petitioners request for an evidentiary hearing was denied by the Trial Court) it would appear that the dismissal was, at the very least premature, and predicated upon a misapplication of precedent.

Petitioner herein has rights and duties at law. It has alleged substantial adverse effects upon interstate commerce

and serious injury and damage to itself which entitle it to relief pursuant to 15 U.S.C. 26 as a result of per se violations of the antitrust laws of the United States and has alleged that the cause of such damage are the Respondents activities and imposition of the 99 year lease contract.

Respondents would have each of the hundreds of thousands of the individual members of corporate condominium associations such as Petitioner, bring individual actions when it is readily apparent that the actions can be manageably brought by individual corporate condominium associations to effect the exact same relief which could be sought by the individuals (The U.S. District Court has refused to permit individual actions in any event).

The bare conclusionary statements by Respondent that "the Association has not suffered and cannot be threatened with injury so as to invoke jurisdiction on behalf of itself" is erroneous and not supported by the record in this cause.

No evidentiary hearing on this issue was permitted.

The question is of such importance to Petitioner and other corporate condominium associations throughout the various Circuits which are in similar positions of financial extremis due to these illegal contracts and arrangements that this Court should grant certiorari and oral argument to determine the issues of standing and jurisdiction presented in this petition.

CONCLUSION

For the reasons and arguments of law stated in the Petition for Writ of Certiorari and brief in support of Petition and

those set forth herein, this Court should issue a Writ of Certiorari to review the Fifth Circuit's decision in *Buckley Towers Condominium, Inc. vs. Buchwald*, 533 F. 2d 934 (5th Cir. 1976), due to the demonstrated conflict between the Circuits, for the reason that housing, a basic necessity of life is involved and additionally,due to the wide application and seriousness of the questions presented.

Respectfully submitted:

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By: _____
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that three copies of the foregoing Reply Brief of Petitioner, were mailed this 11th day of February, 1977 to Darrey A. Davis, Esq., Steel Hector & Davis, Counsel for Respondent, 1400 S. E. First National Bank Building, Miami, Florida 33131, in accordance with Rule 33 of the Supreme Court.

By: _____
Joseph S. Paglino, Esq.
Attorney for Petitioner

OPINION OF FIFTH CIRCUIT COURT OF APPEALS

BURLEIGH HOUSE CONDOMINIUM, INC., a non profit Florida Corporation, on behalf of itself and its membership, Plaintiff-Appellant,

v.

Herbert BUCHWALD, Individually, and as Trustee, and Burleigh House, Inc., a Florida Corporation for profit, Individually, jointly and severally, Honorable Robert Shevin, as Representative of the State of Florida, Defendants-Appellees,

No. 76-1847

United States Court of Appeals, Fifth Circuit

Jan. 26, 1977

A condominium association brought action for alleged violations of the Sherman Act. The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., denied a motion to dismiss. The defendants appealed. The Court of Appeals held that the condominium association lacked standing to sue as a real party in interest under antitrust statutes.

Judgment vacated and case remanded for entry of order of dismissal.

Monopolies - 28(1.6)

Condominium association lacked standing to sue as real

party in interest under antitrust statutes. Sherman Anti-Trust Act,§§ 1, 2, 15 U.S.C.A. §§1, 2; Clayton Act, §4, 15 U.S.C.A.§ 15.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

Appellant, Burleigh House Condominium, Inc., a non-profit Florida condominium association, brought this action on behalf of itself and its membership against the developer, Burleigh House, Inc., and Herbert Buchwald, Trustee of the Burleigh House Condominiums for alleged violations of the Sherman Act, 15 U.S.C.§§ 1 and 2. This cause went to trial and, at the close of the evidence offered by appellant, the district court granted appellee's motion for directed verdict. The condominium association appealed on several grounds but we will not reach those issues. This Court's primary concern is whether or not the condominium association has standing to sue as a real party in interest under 15 U.S.C. §15. This question was raised by the appellees in their motion to dismiss filed March 4, 1975 which the district court denied.

In a case with remarkably similar facts and issues this court held that a condominium association lacks standing to maintain an action under the antitrust statutes. *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1976).

Therefore, we vacate the judgment of the trial court and remand for entry of an order of dismissal.

APPENDIX 2

COMPLAINT FOR ATTORNEYS' FEES

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CIVIL ACTION NO. 76-33461

HERBERT BUCHWALD, TRUSTEE,
Plaintiff,

vs.

BUCKLEY TOWERS CONDOMINIUM, INC., a Florida non profit corporation,
Defendant,

COMPLAINT FOR ATTORNEYS' FEES

Plaintiff, HERBERT BUCHWALD, TRUSTEE, sues defendant, BUCKLEY TOWERS CONDOMINIUM, INC., a Florida non profit corporation, and alleges:

1. This is an action for recovery of attorneys' fees in excess of $2,500.00 due and owing by defendant to plaintiff under and pursuant to the terms of the court approved settlement agreement of the parties and the Buckley Towers Community Facility Lease incorporated in the settlement agreement.

2. Plaintiff, as lessor, and defendant, as lessee, made and

entered into a written lease, entitled Buckley Towers Community Facility Lease, dated December 17, 1968, and recorded December 18, 1968, in Official Record Book 6210, at Page 443 of the Public Records of Dade County, Florida, wherein and whereby the property and premises described therein were leased and demised upon the terms and conditions therein prescribed.

3. The said Buckley Towers Community Facility Lease provides in pertinent part:

> *Attorneys' Fees and Costs.*
>
> The Lessee (defendant herein) shall pay to the Lessor (plaintiff herein) all costs of court. . . and reasonable attorneys' fees, including fees in connection with procedures in the nature of appeal, incurred or expended by the Lessor in enforcing the terms of this lease. The amount of such costs and fees may, at the option of the Lessor, be collected just as though the said amount were rent then maturing and becoming due thereunder.

The lease between the parties further provides:

> *Indemnification.*
>
> The Lessee (defendant herein) indemnifies and agrees to save harmless the Lessor (plaintiff herein) from and against any and all claims, debts, demands or obligations which may be made against the Lessor . . . arising by reason of or in connection with the making of this lease. . . and if it be-

> comes necessary for the Lessor to defend any actions seeking to impose any such liability, the Lessee will pay to the Lessor all costs and reasonable attorneys' fees incurred by the Lessor in effecting such defense in addition to any other sums which the Lessor may be called upon to pay by reason of the entry of a judgment . . .

4. Thereafter, on April 8, 1971, the parties entered into a comprehensive agreement resolving all matters of controversy existing between them. The defendant lessee, and its members, the condominium unit owners, as class plaintiffs in consolidated litigation pending before this Court (Consolidated Cases Nos. 70-23629, 71-551 and 71-1619) executed the settlement for the purpose of ratifying confirming and approving the validity and enforceability of the terms of the Buckley Towers Community Facility Lease. The lease was secured by collateral assignment of the rents by special bank deposits. The settlement agreement was approved by order of court pursuant to joint request of the parties.

5. The parties performed all the terms of the settlement agreement and the Community Facility Lease until November 19, 1974, when the defendant lessee questioned the legality of the Community Facility Lease and refused to pay the rent prescribed therein. The defendant lessee, having performed the terms and conditions of the settlement agreement for more than three years and having accepted the benefits of the settlement agreement, repudiated and refused to be bound by the terms thereof contending that the Community Facility Lease was invalid and unenforceable.

6. The plaintiff lessor brought proceedings in this Court seeking enforcement of the settlement agreement and the

terms of the Community Facility Lease incorporated as part of the settlement agreement. Pursuant to such proceedings, the Court on February 6, 1975 rendered an order enforcing the settlement agreement, adjudicating in pertinent part:

> 1. The settlement agreement made and entered into on April 8, 1971, . . . is valid and in full force and effect and binding in all respects on the parties executing the settlement agreement.
>
> 2. All parties, including plaintiff condominium association, Buckley Towers Condominium, Inc., and the condominium apartment unit owners and members of said condominium association, as class plaintiffs, are required to comply with, perform, abide by, and live up to the terms and conditions of said settlement agreement, including the Community Facility Lease made a part of the settlement agreement.

On appeal taken by the defendant lessee, the appellate courts affirmed the decision of this Court. *See Buckley Towers Condominium, Inc. v. Buchwald*, 321 So. 2d 628 (3rd D.C.A. 1975), *appeal dismissed*, 327 So. 2d 31 (Fla. 1976), *appeal dismissed*, 330 So. 2d 15 (Fla. 1976).

7. Notwithstanding the decision of the courts adjudicating the validity of the Community Facility Lease, the defendant lessee sued the plaintiff lessor in the United States District Court (Case No. 75-38-Civ-JLK), alleging that the Community Facility Lease was invalid and unlawful under federal antitrust laws, and demanding (a) cancellation and rescission of the lease and all obligations thereunder, (b) injunction against the enforcement of the terms and conditions of the

lease, (c) restitution and recovery of all rents paid since 1968 as damages and attorneys' fees, and (d) award of the demised property and premises to the lessee and its members as damages. After extensive proceedings, the court dismissed the action for failure to state a claim upon which relief can be granted. *See Buckley Towers Condominium, Inc. v. Buchwald*, 399 F. Supp. 38 (S.D. Fla. 1975). On appeal taken by the lessee, the United States Court of Appeal affirmed the decision of the trial court. *See Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5 Cir. 1976), and denied the lessee's petitions for rehearing.

8. On December 18, 1975, the lessee, Buckley Towers Condominium, Inc., sued the lessor, Herbert Buchwald, Trustee, in the United States District Court (Case No. 75-3002-Civ-JE) claiming the state court enforcement of the terms of the Community Facility Lease violated the constitutional rights of the lessee under the federal civil rights law (42 U.S.C. Sec. 1983). The lessee demanded an injunction against the lessor temporarily and permanently enjoining any action seeking enforcement of the terms of the Community Facility Lease and the collection of the rent prescribed in the lease. Pursuant to extensive proceeding, the federal court on February 23, 1976, dismissed the lessee's civil rights action adjudicating in pertinent part that:

> (T)he Court finds that all matters presented in the complaint in this cause, including Federal constitutional questions, have been presented to the State Courts of Florida and most are now pending there. This Court has no supervisory authority over any State Court. The Plaintiff has heretofore chosen its forum.

Accordingly, it is ordered and adjudged that the complaint in this cause is dismissed without prejudice.

9. By reason of the actions of the defendant lessee, Buckley Towers Condominium, Inc., in attacking the validity and enforceability of the Community Facility Lease by the Federal court proceedings aforesaid, the plaintiff lessor, Herbert Buchwald, Trustee, has been compelled to retain counsel to defend him in such litigation and to protect and preserve his rights in enforcing the terms of the lease. The plaintiff lessor agreed and obligated himself to pay reasonable attorneys' fees to his undersigned counsel for the legal services reasonably and necessarily required in connection with the defense of the federal court actions brought by the defendant lessee involving the validity of the Community Facility Lease and the enforcement of the terms thereof, with the understanding that the amount constituting fair and reasonable attorneys' shall be fixed and determined by the Court in accordance with the terms of the Community Facility Lease and in the light of the circumstances involved.

10. Plaintiff avers that, under the terms of the Community Facility Lease hereinabove set out, the defendant lessee is under a legal duty to indemnify and hold plaintiff harmless and to reimburse plaintiff for reasonable attorneys' fees incurred in connection with the defense of said federal court litigation brought against him by defendant, as fixed and determined by this Court.

WHEREFORE, plaintiff demands judgment against defendant for fair and reasonable attorneys' fees with interest and costs for the legal services necessarily performed by the

undersigned counsel for plaintiff in defending said federal court litigation, to be assessed by the court in accordance with the provisions of the Community Facility Lease.

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Attorneys for Plaintiff

By: s/ Darrey A. Davis
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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 76-33461

HERBERT BUCHWALD, TRUSTEE,

Plaintiff

vs.

BUCKLEY TOWERS CONDOMINIUM,
INC., a Florida non-profit Corporation,

Defendant

MOTION TO DISMISS

SPECIAL APPEARANCE

Defendant, through counsel, moves to dismiss the complaint filed in this cause and says:

1. This court lacks jurisdiction of the subject matter of the complaint, since the complaint seeks to recover on a claim which was before the United States District Courts and tried by a United States District Judge. Any claim for relief arising from causes in the United States District Court should have been presented in that court and, if not presented, are barred.

2. This Court lacks jurisdiction of the defendant for the purposes set forth in the complaint and can not order the relief requested against the defendant due to such lack of jurisdiction.

3. Alternatively, there is a failure to join indispensable

parties, to wit; all members of the Buckley Towers Condominium, Inc., condominium association.

4. Alternatively, the action is barred by the doctrine of Res Judicata, Collateral Estoppel or Estoppel by Judgment, due to the finality of the Federal Judgments relied upon in the complaint.

5. Alternatively, the complainant failed to annex any judgments from the federal courts upon which reliance is placed for the claim stated in this cause, nor any enabling order from the United States District Court in support of the claim advanced in the complaint.

6. Alternatively, the complaint is a sham, frivolous and an attempt to trifle with the United States District Court, this Court and the Statutes of the United States.

7. No cause of action is stated or can be stated for the relief requested in this cause, nor does a Circuit Court in the State of Florida have authority under either the United States Constitution or the enabling portions of the Florida Constitution to award attorneys fees for matters tried under the Antitrust laws of the United States or other United States Statutes in the Federal Court system.

WHEREFORE, for the reasons stated above, it is respectfully requested that the Court:

A. Dismiss the complaint with prejudice and impose such sanctions as it deems fit and proper.

B. Alternatively, Order the plaintiff to bring his claim for attorneys fees to the United States District Court, before

the United States District Court Judge who tried the cases cited by complainant.

WHEREFORE, defendant, specially appearing to contest jurisdiction of its person and subject matter, respectfully moves that the complaint be dismissed with prejudice.

IT IS HEREBY CERTIFIED that a true copy of the foregoing was furnished by mail this 6th day of November, 1976 to Darrey A. Davis, Esq., Counsel for plaintiff, 1400 First National Bank Bldg., Miami, Fla. 33131.

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CIVIL ACTION NO. 76-33461
Division 18

HERBERT BUCHWALD, TRUSTEE,

Plaintiff

vs.

BUCKLEY TOWERS CONDOMINIUM, INC., a Florida non profit corporation,

Defendant

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came on to be heard upon defendant's motion to dismiss incorporating a special appearance for the purpose of contesting jurisdiction. The Court having heard extensive arguments of counsel, having made independent research of the law, and being fully advised in the premises, it is

ORDERED that said motion be and the same is hereby denied. The defendant shall file its answer to the complaint within fifteen (15) days from and after the date hereof.

DONE AND ORDERED at Miami, Florida, this 20th day

of December, 1976.

s/ Sam I. Silver
CIRCUIT JUDGE

Copies furnished to:

Joseph S. Paglino, Esquire
Darrey A. Davis, Esquire